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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1964

## No. 843

PAUL V. CASE, PETITIONER

*vs.*

NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JULY 11, 1964
CERTIORARI GRANTED JANUARY 18, 1965

# Supreme Court of the United States

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*vs.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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INDEX


| | Original | Print |
|---|---|---|
| Record from the District Court of the Third Judicial District of Nebraska, in and for Lancaster County | | |
| In forma pauperis statement and motion for counsel | 1 | 1 |
| Petition for writ of habeas corpus | 2 | 2 |
| Statement of cause | 3 | 3 |
| Statement of facts | 4 | 4 |
| Points of authority | 5 | 5 |
| Argument | 6 | 6 |
| Certification | 7 | 8 |

| | Original | Print |
|---|---|---|
| Record from the District Court of the Third Judicial District of Nebraska, in and for Lancaster County—Continued | | |
| Appendix "A"—Information | 8 | 9 |
| —Journal entry, April 18, 1963—Information for Burglary | 9 | 10 |
| —Journal entry, May 2, 1963—Information for Burglary | 9 | 10 |
| Appendix "B"—Commitment | 10 | 11 |
| Appendix "C"—Certification by Clerk of District Court | 11 | 13 |
| Appendix "D"—Praecipe | 11 | 14 |
| —Notice of Hearing | 12 | 14 |
| Journal entry of order overruling appointment of counsel and order denying petition for writ of habeas corpus | 13 | 16 |
| Notice of appeal to the Supreme Court of the State of Nebraska | 15 | 17 |
| Clerk's certificates | 16 | 17 |
| Proceedings in the Supreme Court of the State of Nebraska | 19 | 19 |
| Motion for appointment of counsel | 19 | 19 |
| Order denying motion for appointment of counsel | 21 | 20 |
| Opinion, Brower, J. | 22 | 20 |
| Judgment | 36 | 30 |
| Clerk's certificate (omitted in printing) | 37 | 30 |
| Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari | 38 | 31 |

[fol. 1]

PLEAS: In the District Court, Third Judicial District of Nebraska in and for the county of Lancaster, at the January 1963 term of said court, begun and held in the city of Lincoln in said county and state on the 21st day of January, 1963 and on a day therein to-wit: On the 12th day of September, 1963 (that being the 164th Judicial Day of the January 1963 term of said court) Present: Honorable Herbert A. Ronin, Judge Presiding, Merle C. Karnopp, Sheriff and W. F. Sanders, Clerk.

* * * *

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY**

Criminal Case 18-119

* * * *

PAUL VERNON CASE

*vs.*

THE STATE OF NEBRASKA

INFORMA PAUPERIS

Petitioner is a Pauper Citizen of these United States, and is without monies, funds, goods or property of any kind to defray costs of filing, docketing, or prosecution to conclude this motion.

* * * *

MOTION FOR COUNSEL

Comes now the Petitioner, Paul Vernon Case, and upon his oath, states that he is a Pauper Citizen of these United States and, therefore, unable to employ counsel to protect

his interest in the above entitled cause. Petitioner now asks this Court to appoint counsel to act in his behalf.

PAUL V. CASE
PAUL VERNON CASE, Petitioner

[*Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)*]

[fol. 2]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

18-119

Docket 17; Page 170; Criminal Case

[File Endorsement Omitted]

THE STATE OF NEBRASKA )
Lancaster County ) ss.
)

PAUL VERNON CASE

*vs.*

THE STATE OF NEBRASKA

PETITION FOR WRIT OF HABEAS CORPUS—filed September 9, 1963

*Jurisdiction*

Comes now the Petitioner, Paul Vernon CASE, and upon his oath, states that he is a native-born citizen of the United States being born in Marion, Ohio on July 22, 1924. That he is now and at this time, confined in the Nebraska Penal and Correctional Complex at Lincoln, Ne-

braska. Petitioner, Paul Vernon CASE further states that he is entitled to all privileges and sanctions guaranteed by the U.S. Constitution of the Nebraska State Constitution. Said Petitioner further states that a certain document, entitled "Commitment" is depriving him of his liberty; said document being obtained through fraudulent means by the authorities of Lancaster County, Nebraska, on or about the third day of May, 1963 A.D. This Court, therefore, has jurisdiction, Petitioner prays the Court will, therefore, grant Writ of Habeas Corpus and free him from bondage.

PAUL V. CASE
PAUL VERNON CASE, Petitioner

*[Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)]*

[fol. 3]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

* * * *

PAUL VERNON CASE

*vs.*

THE STATE OF NEBRASKA

STATEMENT OF CAUSE

Petitioner, Paul Vernon CASE, was sentenced to five (5) years in the Nebraska Penal and Correctional Complex on May 3, 1963, A.D.

Petitioner was "fast talked" and forcibly coerced into waiving his rights (U.S. Constitutional Rights) to have advice and counsel; to have a Preliminary Hearing, and to plead not-guilty.

Mr. William D. Blue told Petitioner he, Petitioner, would be charged with being "An Habitual Criminal" if

he did not waive these rights. He, Petitioner was held in Solitary Confinement in City Jail, until such time as he would agree-under cruel and unusual circumstances.

The basic rights waived by this Petitioner are guaranteed him under the Sixth Amendment of the U.S. Constitution and are so fundamental and essential to a fair trial that they are made obligatory upon the States, *All* states, by way of the Fourteenth Amendment. For reference see Gideon vs. Wainwright in the U.S. Supreme Court. October 1962, Term, No. 155; all Justices concurring.

PAUL V. CASE
PAUL V. CASE, Petitioner

[*Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)*]

[fol. 4]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

* * * *

PAUL VERNON CASE

*vs.*

THE STATE OF NEBRASKA

STATEMENT OF FACTS

Petitioner was stopped by police in a prowl car while he, Petitioner, was walking on the street near Brian Memorial Hospital. His identification was "radioed" in to Police Headquarters-even though Petitioner had no weapon or article of suspicion on his person. Police Headquarters notified prowl car to "hold him-he's on parole."

Petitioner was lodged in city jail in solitary confinement, with no bedding, no sanitation or toilet articles—

the heat was turned on full, two unedible meals per day —and no contact with counsel. Petitioner was "herded" into police line-up at least thirty (30) times in four (4) days.

Petitioner was "booked" on an open charge—which is illegal, at about 1:00 o'clock a.m., Monday, April 15, 1963. He was held incommunicado until noon of April 18, 1963—at which time he was taken before William D. Blue, Chief Deputy Prosecutor, and threatened with the "habitual Criminal Act" if he did not plead guilty; waive his right to counsel, and waive his right to preliminary hearing.

Waiving his Constitutional Rights, under these circumstances, is a violation—not to be tolerated, as petitioner will prove in "Points of Authority" and "Arguments" which follow immediately.

PAUL V. CASE
PAUL VERNON CASE, Petitioner

[*Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)*]

[fol. 5]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

* * * *

PAUL VERNON CASE

*vs.*

THE STATE OF NEBRASKA

POINTS OF AUTHORITY

This is a simple case and, therefore, needs but some little (one) authority to govern—that of Gideon vs. Wainwright; U.S. Supreme Court, October Term, 1962, No. 155.

It must first be realized that when the U.S. Supreme Court decided Gideon vs. Wainwright, Supra., they first

had to reconsider Betts vs. Brady, 316, U.S. 455. In so doing, the Court reversed Betts vs. Brady in order to reverse Gideon vs. Wainwright.

This Petitioner's case is identical to Gideon's even to the crime and sentence imposed.

When the U.S. Supreme Court reversed Gideon vs. Wainwright, Supra., they made the Sixth Amendment, U.S. Constitution, binding on the States—all of the States—by reason of the Due Process Clause of the Fourteenth Amendment.

PAUL V. CASE
PAUL V. CASE, Petitioner

[*Duly sworn to by Paul Vernon Case jurat omitted in printing (all in italics)*]

[fol. 6] ARGUMENT

This Petitioner has a case which is parallel to Gideon vs. Wainwright, U.S. Supreme Court, October Term, 1962, No. 155. He appeared before the Honorable Herbert A. Ronin in District Court, on two (2) occasions. First for arraignment—I think—and secondly was definitely for sentence. He received five (5) years. *At no time* was counsel present in the Court for the benefit of the defendant—or to advise him of his rights.

It is realized that the State may first contend that the Petitioner waived his rights. From Gideon vs. Wainwright, supra, "* * * unless these rights are competently and intelligently waived". And also, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes, no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without aid of counsel, he may be put on trial without a proper charge, and convicted on improper evidence—or evidence irrelevant to the

issue, or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he doesn't know how to establish his innocence."

It may be argued, secondly, by the State that counsel is mandatory, only in capital cases. From Gideon vs. Wainwright, supra, the accenting opinion of Mr. Justice Clark: " * * * I must conclude here, as in Kinseller vs. United States ex rel. Singleton, 361 US 234, that the Constitution makes no distinction between capital and non-capital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty" just as for deprival of "life", and there cannot Constitutionally be a difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty is less onerous than deprived of life—a value judgment not universally accepted—or that only the lat-
[fol. 7] ter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I, therefore, concur in the judgment of the Court." Justice Clark concurring

Thirdly, and finally, the State may argue that laws of the State of Nebraska, and of the Nebraska Constitution, do not require an attorney to be appointed. Petitioner can only refer the Court to the entire text of Gideon vs. Wainwright, supra. It is devoted specifically to the task of dispelling any lingering doubts as to whether the Fourteenth Amendment makes the Sixth Amendment binding on the States—*all* States—and, therefore, fundamental in nature.

In conclusion the Petitioner would like to point out that the wrong against him was instigated and executed by the Prosecution in the person of one William D. Blue, Chief Deputy. The only way this Petitioner could "competently and intelligently waive his rights", would be if he was a qualified attorney, licensed to practice law in the State of Nebraska. He most assuredly is not! Mr. William D.

Blue, with malice aforethought, did willfully, forcefully, and feloniously coerce and harrass this Petitioner into waiving his fundamental Constitutional Rights—contrary to the laws and guarantees of the U.S. Constitution as set forth in the Sixth Amendment and made forcing on the State of Nebraska by the Fourteenth Amendment.

Petitioner should not have to take his plea higher than this Court, as this Court has full authority to rectify this wrong by reason of Gideon vs. Wainwright, supra; and that it governs. Judgment against Petitioner should be reversed.

PAUL V. CASE
PAUL VERNON CASE, Petitioner

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

* * * *

CERTIFICATION

I, R. E. Ranard, a Notary Public in and for the County of Lancaster, Nebraska, hereby certify that all documents contained in the appendix annexed hereto are correct and true copies of copies issued by the Clerk of the District [fol. 8] Court for the County of Lancaster, Nebraska.

In testimony whereof, I have this day set my hand and affixed my seal, on the 5th day of September, A.D., 1963.

[SEAL]

R. E. RANARD
R. E. RANARD, Notary Public

My Commission expires *7-13-68*

## APPENDIX "A"

## VERBATIM COPY OF "INFORMATION".

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

THE STATE OF NEBRASKA )
Lancaster County ) ss.
)

### INFORMATION

THE STATE OF NEBRASKA

*vs.*

PAUL CASE

BE IT REMEMBERED, That *William D. Blue, Chief Deputy*, County Attorney in and for Lancaster County, and in the Third Judicial District of the State of Nebraska, who prosecutes in the name and by authority of the State of Nebraska, comes here in person into Court at this, the *January* Term, A.D. 1963, thereof, and for the State of Nebraska, gives the Court to understand and be informed that Paul Case late of the County aforesaid, on or about the *14* day of *April*, A.D., 1963 in the County of Lancaster, and the State, aforesaid, then and there being, did

> unlawfully, wilfully, maliciously, feloniously and forcibly break and enter into a certain dwelling house numbered 3800 Stockwell Street in the city of Lincoln, County of Lancaster, Nebraska which said dwelling house is owned and occupied by Wayne D. Kingery, with the intent of the said Paul Case then and there to steal property of value contained in said dwelling house,

contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

/s/ William D. Blue
Chief Deputy County
Attorney

[fol. 9]

VERBATIM COPY OF "JOURNAL ENTRY

JOURNAL ENTRY

That on the 18th day of April, 1963 (that being the 63rd Judicial Day of the January 1963 term of said court) were had and done the following proceedings as appear upon Court Journal "286" at page 73, Honorable Herbert A. Ronin, Judge to-wit:

17-170 Information for Burglary

THE STATE OF NEBRASKA

*vs.*

PAUL CASE

Now on this day comes the Deputy County Attorney, William D. Blue, on behalf of the State of Nebraska and defendant appears in court and after waiving his constitutional rights, said defendant standing at the bar of this court in open court is duly arraigned on the information filed against him herein, and said information having been read to him, he is duly inquired of by the Court whether he is guilty or not guilty of the offense charged against him in said information, and the defendant for his answer thereto says he is "Guilty". The Court accepts said plea and finds the defendant guilty as charged.

Custody of defendant is remanded to the Sheriff of Lancaster County, Nebraska and sentence is deferred pending a pre-sentence investigation of the case by the Adult Probation Officer of the Court.

---

JOURNAL ENTRY

That on the 2nd day of May, 1963 (that being the 72nd Judicial Day of the January 1963 term of said court) were had and done the following proceedings as appear

upon Court Journal "286" at page 131, Honorable Herbert A. Ronin, Judge to-wit:

17-170 Information for Burglary

THE STATE OF NEBRASKA

*vs.*

PAUL CASE

Now on this day comes the County Attorney on behalf of the State of Nebraska and the defendant being present in Court, this cause comes on for sentencing.

The defendant had nothing to say prior to sentencing.

It is therefore considered, ordered and adjudged by the Court that the said defendant, Paul Case, is guilty as he stands charged in the information filed herein and that he be imprisoned and confined in the Nebraska Penal and Correctional Complex in Lancaster County, Nebraska for [fol. 10] a period of five (5) years from this date until released according to law, and pay the costs of this prosecution taxes at $——.

It is further considered, ordered and adjudged by the Court that said sentence is to run consecutively to the present term now being served by the defendant.

APPENDIX "B"

VERBATIM COPY OF "COMMITMENT."

THE STATE OF NEBRASKA )
Lancaster County ) ss.
)

The State of Nebraska To the Sheriff of Said County:

WHEREAS, At the regular term of the District Court for said County, which term was begun and held at the Court Rooms, in Lincoln, in said County, on the *21st* day of *January* 196*3*. Present, the *Hon Herbert A. Ronin, Elmer M. Scheele, John L. Polk and Bartlett E. Boyles,*

Judges, AND WHEREAS, the County Attorney in and for said County, on the *18th* day of *April* 196*3*, came into Court and presented a certain information in due form of law, against *Paul CASE* for *BURGLARY* which information was by order of the Court filed and the cause docketed; and afterwards, on the *18th* day of *April* 196*3*, further proceeding were had upon said information, to-wit: The said defendant *PAUL CASE* was duly arraigned and entered *his* plea of guilty to the charge contained in the information.

AND WHEREAS, on the *2nd* day of *May*, 196*3*, the said defendant was duly arraigned before the Court for sentence, and was then by the *Hon. Herbert A. Ronin*, Judge sentenced in these words:

> "It is therefore considered, ordered and adjudged by the Court that the said defendant, Paul Case, is guilty as he stands charged in the information filed herein and that he be imprisoned and confined in the Nebraska Penal and Correctional Complex in Lancaster County, Nebraska for a period of five (5) years from this date until released according to law, and pay the costs of this prosecution taxed at $*35.00*.
>
> [fol. 11] It is further considered, ordered and adjudged by the Court that said sentence is to run consecutively to the present term now being served by the defendant."

You are therefore commanded to proceed to execute the said sentence and order of the Court.

WITNESS my hand and seal of said Court, at Lincoln, this *2nd* day of *May* 196*3*.

W. F. SANDERS, Clerk
By /s/ Dorothy T. Metcalf, Deputy

## APPENDIX "C"

VERBATIM COPY OF "CERTIFICATION BY CLERK OF DISTRICT COURT:

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA.

STATE OF NEBRASKA, )
COUNTY OF LANCASTER ) ss.
)

* * * *

I, W. F. SANDERS, Clerk District Court, Third Judicial District of Nebraska within and for the County of Lancaster, do hereby certify that the above and foregoing *are* true and complete copies of

> INFORMATION—and COMMITMENT, with all endorsements thereon and ARRAIGNMENT, ETC—SENTENCE—entered in a cause in said court wherein THE STATE OF NEBRASKA is plaintiff and PAUL CASE is defendant,

as the same appears fully upon the records and files of said court and now in my charge remaining as Clerk aforesaid.

WITNESS my hand and the seal of said court at Lincoln, Nebraska, this *27th* day of *August*, 1963.

s/s W. F. Sanders,
Clerk District Court

By s/s Otis F. Nelson
Deputy

## APPENDIX "D"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY.

Docket 17; Page 170 Criminal Case

THE STATE OF NEBRASKA )
Lancaster County ) ss
)

PAUL VERNON CASE

*vs.*

THE STATE OF NEBRASKA

[fol. 12] PRAECIPE

TO: The Assignment Clerk of Said Court:

Sir: You will please place this Motion, together with the attached papers, upon the Docket at/of the Court for hearing before the Honorable Herbert A. Ronin, Judge of said Court, in his Court Room at nine-thirty o'clock in the forenoon of September 16, 1963, A.D., or as soon thereafter as Counsel may be heard.

* * * *

NOTICE OF HEARING

TO: Paul Douglas, Prosecuting Attorney for Lancaster County:

Sir: You will please take notice, that on this date, I have filed Motion, together with the attached papers, with the Clerk of said Court for hearing in accordance with the terms of the Praecipe attached hereto. This cause, on this question, has not heretofore been brought

before this Court, and is now ready for hearing.

PAUL V. CASE
PAUL VERNON CASE, Petitioner
Acting in Proper Person
Box 111
Lincoln, Nebraska

State of Nebraska )
County of Lancaster )

On this the 5 day of September, 1963, before, R. E. Ranard, the undersigned officer, personally appeared Paul Vernon CASE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

R. E. RANARD
R. E. RANARD,
Notary Public

[SEAL]

My Commission expires 7-13-68.

Clerk's Office, District Court, Lancaster County, Nebraska —Filed Sep 9, 1963—W. F. Sanders, Clerk District Court.

[fol. 13]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

PAUL VERNON CASE

*vs.*

THE STATE OF NEBRASKA

JOURNAL ENTRY OF ORDER OVERRULING APPOINTMENT OF COUNSEL AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—September 12, 1963

* * * * *

On poverty affidavit filed herein, it is by the Court ordered that the petitioner herein be and hereby is allowed to file a petition in forma pauperis.

Motion of the petitioner for the appointment of counsel is overruled.

This cause now comes on to be heard on the petition for a Writ of Habeas Corpus, and is submitted to the Court, on due consideration whereof the Court finds that the petition does not state facts sufficient to require the issuance of the Writ of Habeas Corpus asked by the petitioner and does not state a cause of action for the issuance of the Writ.

It is therefore considered, ordered and adjudged by the Court that the petition of the petitioner be and the same hereby is denied and the petition herein be and hereby is dismissed.

* * * * *

[fol. 14] * * *

[fol. 15]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA, IN AND FOR LANCASTER COUNTY

MAIL
Sep 19 1963
#1

NOTICE OF APPEAL—filed September 20, 1963

September 18, 1963

Paul V. Case, 23049
Box 111
Lincoln, Nebraska

Wilford F. Sanders,
Clerk of the District Court
Lincoln, Nebraska

Re: 18-119

(Paul V. Case, vs. State of Nebraska)

Dear Mr. Sanders:

Would you kindly forward the petition for Writ of Habeas Corpus in the above named case 18-119 to the Clerk of the Nebraska State Supreme Court?

This above action is desired so that an appeal before the State Supreme Court can be made and this action brought a *conclusion*.

Very truly Yours,

Paul V. Case, 23049

[File Endorsement Omitted]

[fol. 16]

[Clerk's Certificate to foregoing paper and transcript omitted in printing]

[fol. 17]

35637

18-119

CASE

*v.*

STATE.

Certified Copy of Notice of Appeal

SUPREME COURT OF NEBRASKA
FILED
Sep 23 1963
GEORGE H. TURNER,
Clerk

[fol. 18] * * *

[fol. 19]

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

# 35637

PAUL V. CASE, 23049

*vs.*

STATE OF NEBRASKA

MOTION FOR APPOINTMENT OF COUNSEL—filed December 23, 1963

Comes now the Petitioner, Paul V. Case, and respectfully requests that counsel be appointed to represent his interests in the above numbered cause.

This Petitioners cause becomes more and more complicated by the day—due to the new decisions handed out by the United States Supreme Court and the many things Petitioner is learning from other sources.

All this material is useless to the Petitioner without the advice of counsel because of Petitioners state of confinement and the regulations imposed.

This Petitioner, on this cause, has never had the benefit of counsel. Due the far reaching possibilities of the outcome of this case it would seem that counsel is a prerequisite.

/s/ Paul V. Case, 23049

[fol. 20]

[File Endorsement Omitted]

[fol. 21]

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

* * * *

No. 35637.

PAUL V. CASE, APPELLANT

*v.*

STATE OF NEBRASKA, APPELLEE

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL—January 3, 1964

This cause coming on to be heard upon motion of appellant for appointment of counsel was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and it hereby is, denied.

[fol. 22]

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

35637

CASE

*v.*

STATE

1. A provision of the Bill of Rights of the Constitution of the United States which is fundamental and essential to a fair trial is made obligatory upon the states by the Fourteenth Amendment; the Sixth Amendment's guaranty of counsel is one of these fundamental rights.

2. The due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees the assistance of counsel, unless that right is intelligently and understandingly waived by the accused.

3. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss.

4. Where the constitutional infirmity of a state criminal trial without counsel is manifested, and there is no allegation or showing of affirmative waiver of counsel, a resulting conviction is unconstitutional and the accused is entitled to relief therefrom.

5. A plea of guilty must be freely and understandingly made by one competent to know the consequences thereof.

6. The sufficiency of the statements of the petition of relator to justify a writ of habeas corpus allowed by virtue thereof may be tested before making return thereto by a motion to quash the writ.

[fol. 23] 7. The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it.

8. Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court.

9. It is for the Supreme Court of this state to decide what issues are justiciable in an application for a writ of habeas corpus made to the courts of this state.

10. The Supreme Court of this state has the undoubted right to decide upon its own jurisdiction and the jurisdiction of the courts of this state to which its appellate power extends.

11. Habeas corpus cannot be used as a substitute for a writ of error.

12. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant.

13. When the judgment is regular upon its face and was given in an action where the court had jurisdiction [fol. 24] of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity.

14. The existence of a right is one matter, the availability of a particular remedy in which that right may be asserted is distinctly a separate matter.

[fol. 25] Heard before White, C.J., Carter, Messmore, Yeager, Spencer, Boslaugh, and Brower, JJ.

OPINION—filed June 19, 1964

BROWER, J.

Paul Vernon Case, hereinafter referred to as the petitioner, instituted this habeas corpus action in the district court for Lancaster County, Nebraska, on September 9, 1963. At the time of filing his petition he was confined in the Nebraska Penal and Correctional Complex at Lincoln, Nebraska, hereafter referred to as the complex. The object of the petition is to have a writ of habeas corpus to determine whether he is being unlawfully confined therein.

On September 12, 1963, the district court found that the petition failed to state a cause of action requiring the issuance of the writ, denied the relief requested, and dismissed the petition. From this order the petitioner has perfected an appeal to this court.

The petition alleged he was held incommunicado in solitary confinement in an overheated portion of the city jail for 3 days without proper food or bedding; was repeatedly "herded" into a police lineup; and at the end of such time was "fast talked" and coerced by the chief deputy prosecutor to waive his constitutional rights to preliminary hearing and counsel and to plead guilty under threat of prosecution under the habitual criminal act.

The petition had attached thereto certified copies of the information filed against the petitioner on April 18, 1963, in the district court for Lancaster County, charging him with the crime of burglary. Certified copies of [fol. 26] journals of the court were likewise appended. The first showed that he appeared in court on April 18, 1963, and "after waiving his constitutional rights," he was "duly arraigned on the information filed against him . . . and said information having been read to him," he pleaded "Guilty." The plea was accepted by the court and he was found guilty as charged. His custody was remanded to the sheriff and sentence was deferred pending a presentence investigation. The second journal entry shows petitioner was brought into court on May 2, 1963, and having nothing to say prior to his being sentenced, the judgment of the court was that he be confined in the Nebraska Penal and Correctional Complex for 5 years,

said sentence to run consecutively with the present term being served by him. A certified copy of the commitment to the complex was attached.

Petitioner assigns error to the trial court: In failing to assign counsel to advise petitioner as to his state and federal constitutional rights; in allowing petitioner to waive his rights under the Sixth Amendment to the Constitution of the United States made binding upon the states by the due process clause of the Fourteenth Amendment thereto; and in allowing him to enter a plea of guilty without benefit of counsel. In his brief he admits waiving in the trial court his constitutional rights to preliminary hearing and counsel and entering a plea of guilty but again alleges his acts in that respect were coerced as alleged in his petition.

The petitioner relies on recent decisions of the United States Supreme Court and he particularly cites Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d [fol. 27] 799, 92 A. L. R. 2d 733, which overruled Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595. The Betts case was an appeal from the decision of the Court of Appeals of Maryland in an original habeas corpus proceeding instituted in that court after Betts' conviction and while serving his sentence. The writ was issued; a hearing was had; his contention was rejected; and he was remanded to the custody of the prison warden. Betts had been indicted for robbery in the original trial court in Maryland. He told the trial judge that for lack of funds he was unable to hire a lawyer and asked the trial court to appoint counsel for him. The judge informed him that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. The United States Supreme Court, in a divided opinion after reviewing the law as it existed in the several states at and before the adoption of the federal Constitution, held that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not confer on an indigent person charged with a crime in a state court an absolute right to counsel independent of circumstances, and affirmed the judgment of the Maryland court. The decision turned to some ex-

tent on Betts being a mature person of ordinary intelligence and ability to take care of his own interests on a narrow issue involving the credence to be placed on his claim of an alibi.

The facts in the case of Gideon v. Wainwright, *supra*, may be summarized as follows: In defendant's trial in a Florida state court on a charge of a felony—having broken and entered a poolroom with intent to commit a misdemeanor—the trial court denied defendant's request to appoint counsel for him on the ground that under the [fol. 28] laws of Florida only a defendant charged with a capital offense was entitled to such an appointment. After his conviction defendant filed in the Supreme Court of Florida a petition in habeas corpus. He attacked the conviction on the ground that his federal constitutional rights were violated by the trial court's refusal to appoint counsel. The court, without opinion, denied relief. The Supreme Court of the United States in that case in overruling Betts v. Brady, *supra*, held: A provision of the Bill of Rights of the Constitution of the United States which is fundamental and essential to a fair trial is made obligatory upon the states by the Fourteenth Amendment; the Sixth Amendment's guaranty of counsel is one of these fundamental rights. It held in such a case the refusal of a state trial court to appoint counsel for one prosecuted for a felony violates the Sixth Amendment's guaranty of counsel made obligatory upon the states by the due process clause of the Fourteenth Amendment.

Both before and after Betts v. Brady, *supra*, the Supreme Court of the United States had held that under certain circumstances the due process clause of the Fourteenth Amendment required that counsel be provided a prisoner. It was often applied to those accused of capital offenses. See, Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; Avery v. Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; Hamilton v. Alabama, 368 U. S. 52; 82 S. Ct. 157, 7 L. Ed. 2d 114. The same rule was applied to cases which that court held involved "special circumstances" such as where conviction occurred under the influence of mob spirit, Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969;

[fol. 29] or under alleged community coercion, Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543; or where perjured testimony was knowingly used by a state prosecutor, Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406. However, it was not until the recent case of Gideon v. Wainwright, *supra*, here considered, that the full impact of the Sixth Amendment was applied through the due process clause of the Fourteenth Amendment to all felony cases.

The present requirements in regard to furnishing counsel to indigent defendants in such cases is set forth by the United States Supreme Court in Carnley v. Cochran, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70, and may be stated as follows: The due process clause of the Fourteenth Amendment guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. Where the constitutional infirmity of a state criminal trial without counsel is manifested, and there is no allegation or showing of affirmative waiver of counsel, a resulting conviction is unconstitutional and the accused is entitled to relief therefrom.

In the opinion the United States Supreme Court said: "However, we recognized in Rice v. Olson (324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367) that, although the Fourteenth Amendment would not countenance any presumption of waiver from the appearance of the accused without counsel and the silence of the record as to a request, the entry of the guilty plea might have raised a fact issue as to whether the accused did not intelligently and [fol. 30] understandingly waive his constitutional right. We held that a hearing was required since the facts were in dispute. In the present case, however, there was no guilty plea, and the return to the writ does not allege an affirmative waiver. Therefore, there is no disputed fact question requiring a hearing. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and

understandingly rejected the offer. Anything less is not waiver."

In the cause before us, the writ having been denied, there was no trial and no bill of exceptions is before us showing what happened at the time of the petitioner's plea. The journal of the court merely recites the conclusions of the court that petitioner waived his constitutional rights and entered a plea of guilty. It is only through the assertions of the petitioner in his brief that it can be said that he waived counsel and from his allegations this waiver was induced through the coercion alleged in his application for the writ. It is a general rule that a plea of guilty must be freely and understandingly made by one competent to know the consequences thereof. See, 22 C. J. S., Criminal Law, s. 423 (2), p. 1176; Waley v. Johnston, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302. Whether the facts in the cause before us would show any such coercion is not before us and in view of our decision could not come before us in this type of action.

The petitioner asks that this judgment be reversed because of the recent opinions of the United States Supreme Court herein discussed, Gideon v. Wainwright, [fol. 31] *supra*, and Carnley v. Cochran, *supra*. This involves a discussion of the office of the writ of habeas corpus in this state and the difference between the jurisdiction of this court and the district courts in this state and the courts of the United States in such an action.

It may here be said that the statutes of this state, section 29-1803, R. S. Supp., 1963, provide for the assignment of counsel to one indicted for an offense which is capital or punishable by imprisonment in the Nebraska Penal and Correctional Complex if the prisoner has not the ability to procure counsel and for the payment of the services of such counsel. The right to counsel in a prosecution involving a felony is clear after indictment under this statute. The right to review the proceedings with respect to the denial of certain rights including the omission or refusal to assign counsel to a prisoner so charged has been denied him in a collateral proceeding of habeas corpus by the decisions of this court hereinafter set out.

Section 29-2801, R. R. S. 1943, provides for the issuance of a writ of habeas corpus on application being made on behlaf of one unlawfully deprived of his or her liberty, "except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, * * *." This provision insofar as it relates to persons who have been convicted of crime appears to be in accord with the common law with respect to habeas corpus. See 25 Am. Jur., Habeas Corpus, s. 26, p. 159. See, also, the annotation appended to In re Appeal of Bion, 59 [fol. 32] Conn. 372, 20 A. 662, in 11 L. R. A. 694, citing early cases including those of the Supreme Court of the United States. The section of the statute has existed in its present form since the General Statutes of 1873, p. 804, and the Legislature has not seen fit to alter it. The reports of this court are replete with its decisions interpreting it. A long list of such cases appears in Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 982. In Sedlacek v. Hann, 156 Neb. 340, 56 N. W. 2d 138, this court held: "The sufficiency of the statements of the petition of relator to justify a writ of habeas corpus allowed by virtue thereof may be tested before making return thereto by a motion to quash the writ. * * *

"The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it. * * *

"Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court." See, also, Iron Bear v. Jones, 149 Neb. 651, 32 N. W. 2d 125; In re Application of Carper, 144 Neb. 623, 14 N. W. 2d 225.

In the case of Hawk v. Olson, 145 Neb. 306, 16 N. W. 2d 181, this court affirmed a judgment of the district court in its denial of the issuance of a writ of habeas corpus setting forth substantially the same rules of law as have been hitherto set forth herein. It held that the guilt or innocence of one convicted of crime was not jus-

ticiable in habeas corpus and that such an action is not [fol. 33] recognized by this court as a remedy to review a judgment of conviction for crime. It further held that the facts alleged did not show the petitioner had been denied his right of appeal. In the opinion, however, it was further stated that this court could see nothing in the facts alleged, if true, that in any way prevented the petitioner from having a fair trial. On certiorari in Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 67, the Supreme Court of the United States reversed the judgment and remanded the cause holding that the facts alleged by the petitioner entitled him to a hearing on the claimed violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States because of failure to allow him an opportunity to consult with counsel in the critical period between his arraignment and trial. That court, however, accepted the holding of this court that the sufficiency of the evidence could not be raised by habeas corpus and that the allegations did not show interference with the prisoner's right of appeal. On the cause being remanded the petitioner in the cited case requested the mandate to issue from this court directing the writ of habeas corpus to issue. This court declined to issue the mandate in Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136, stating several rules of law already set out herein and further holding: "It is for the Supreme Court of this state to decide what issues are justiciable in an application for a writ of habeas corpus made to the courts of this state.

"The Supreme Court of this state has the undoubted right to decide upon its own jurisdiction and the jurisdiction of the courts of this state to which its appellate power [fol. 34] extends. * * *

"Habeas corpus cannot be used as a substitute for a writ of error.

"Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant. * * *

"When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evi-

dence is not admissible to show its invalidity (in habeas corpus) . * * *

"The existence of a right is one matter, the availability of a particular remedy in which that right may be asserted is distinctly a separate matter."

The petitioner now urges that because of the decisions of the Supreme Court of the United States hitherto discussed, Gideon v. Wainwright, *supra*, together with the rules respecting the appointment of counsel and the requirements as to the waiver of counsel in Carnley v. Cochran, *supra*, and other similar federal cases, the courts of this state should now consider the evidence relating to the sufficiency of the petitioner's waiver of counsel and plea of guilty in a habeas corpus as well as in a direct proceeding in error or by appeal.

The statute, section 29-2801, R. R. S. 1943, authorizing the writ of habeas corpus and the decisions of this court construing the jurisdiction of courts in such cases hitherto discussed remains unchanged. The Legislature has not seen fit by amendment to enlarge the powers of the courts of this state with respect to such writs. Neither should this court do so by judicial legislation. Post-[fol. 35] conviction procedure is properly one for the Legislature to consider. The position of the courts of this state in respect to questions that are justiciable in habeas corpus are quite limited in comparison with those of the courts of the United States which have been granted authority by Congress to issue such a writ to a prisoner when he is in custody in violation of the Constitution, laws, or treaties of the United States, 28 U. S. C. A., s. 2241, although its power is limited in certain cases including those instances set out in 28 U. S. C. A., s. 2254.

We conclude that under the statutes of this state and the decisions of this court, we have no jurisdiction to review the conviction of the petitioner in a habeas corpus proceeding. It follows that the judgment of the trial court must be affirmed.

AFFIRMED.

[fol. 36]

* * * *

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

* * * *

Appeal from the District Court for Lancaster County. No. 35637

PAUL VERNON CASE, APPELLANT

*v.*

STATE OF NEBRASKA, APPELLEE

JUDGMENT—June 19, 1964

This cause coming on to be heard upon appeal from the district court of Lancaster county was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, affirmed; that appellee recover of and from appellant its costs herein expended, taxed at $ ; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Brower, Judge.

[fol. 37]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 38]

SUPREME COURT OF THE UNITED STATES

No. 228 Misc., October Term, 1964

PAUL V. CASE, PETITIONER

*vs.*

NEBRASKA

On petition for writ of Ceriorari to the Supreme Court of the State of Nebraska.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 18, 1965

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 843 and placed on the summary calendar.

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